Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CENTRA, INC., a Michigan corporation, CENTRAL TRANSPORT, INC., a Michigan corporation, CENTRAL CARTAGE COMPANY, a Michigan corporation, MANUEL J. MOROUN, a/k/a MATTIE MOROUN, and AGNES A. MOROUN, jointly and severally,

Petitioners,

v.

CHARLES GARAVAGLIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals for the State of Michigan (i) erred in upholding the validity of a cause of action based upon a violation of public policy when the basis of the cause of action was that the defendant-employer violated 29 U.S.C. §158(b)(1)(B) which fails to provide private remedies and in any event proscribes conduct by a union and not an employer; and (ii) further highlighted the need for this Court to give guidance to the lower courts regarding an appropriate public policy claim definition by erroneously applying an expansive definition to that cause of action.

IDENTIFICATION OF RESPONDENT

Respondent in this case is Charles Garavaglia ("Garavaglia"), an individual.

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 29.6, Central Transport, Inc. and Central Cartage Co. submit that they are wholly owned subsidiaries of CenTra, Inc. CenTra, Inc. has no parent company. Central Transport, Inc. and Central Cartage Co. have no direct or indirect ownership interest in any other company.

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OPINIONS BELOW

On June 23, 1995, the Court of Appeals for the State of Michigan issued its opinion which is set forth in Appendix A. On July 16, 1996, the Supreme Court of Michigan issued its Order denying the application for leave to appeal. A copy of that Order is set forth at Appendix B.

JURISDICTION

The Order of the Supreme Court of the State of Michigan denying Petitioners' application for leave to appeal the June 23, 1995 decision of the Michigan Court of Appeals was entered on July 16, 1996. Jurisdiction in this Court is based upon 28 U.S.C. §1257. This petition is timely filed pursuant to Rules 13.1 and 30.1.

STATUTE INVOLVED

The rights of a private party litigant under 29 U.S.C. §158(b)(1)(B) is primarily at issue in this case. That section provides as follows:

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . .

29 U.S.C. §158(b)(1)(B).

STATEMENT OF THE CASE

This matter involves whether a state court can engraft a private cause of action to a federal statute which itself confers no private rights or causes of action upon private litigants.

In 1987, Respondent Garavaglia filed suit seeking damages against Petitioners CenTra, Inc., Central Transport, Inc., Central Cartage Co., Manuel J. Moroun and Agnes Moroun (collectively, Centra) as a result of his termination of employment as vice president of labor relations. Garavaglia claimed that his discharge violated public policy enunciated in the National Labor Relations Act, 29 U.S.C. §158(b)(1)(B). Garavaglia alleged that he had a private cause of action against his former employer pursuant to that Act.

The Michigan Court of Appeals characterized Garavaglia's contentions as follows:

> Plaintiff alleged that his employment was terminated in breach of public policy on the bases that defendants submitted to union demands that they fire plaintiff to achieve "labor peace," that plaintiff failed to obey defendants' request to destroy documents subpoenaed by a federal grand jury, and that plaintiff blocked an offer by the union to dismiss a lawsuit by refusing to agree not to countersue the union. Defendants admitted in their trial brief that they terminated plaintiff's employment because of union pressure that there would be no labor peace unless plaintiff was removed. It was plaintiff's contention that it was a violation of the National Labor Relations Act (NLRA) for the union to influence defendants in their choice

> of a bargaining representative. 29 U.S.C.S. 158(b)(1)(B).
>
> * * *
>
> Plaintiff's claim regarding breach of public policy was based on the NLRA. Specifically, plaintiff alleged that defendants breached public policy by yielding to union demands to fire plaintiff. Pursuant to 29 U.S.C.S. 158(b)(1)(B), it is an unfair labor practice for a union to coerce an employer regarding the selection of the employer's labor relations representative.
>
> * * *
>
> Plaintiff alleged that defendants terminated his employment by yielding to union demands that terminating his employment was the only way of achieving labor peace.

See Appendix B at p. 5a-7a, 10a.

At trial, Petitioners preserved the question of the legal sufficiency of this claim "by objecting to the trial court's instructions regarding the alleged breach of public policy." See Appendix B at p. 7a.

The trial court instructed the jury as follows:

> Now, you are instructed that if you find the plaintiff was dismissed from his employment or from performing the obligations, the duties and demands of his office or release [sic] from his employment service, or moved from a greater

> job to a lesser job that you may find that plaintiff was wrongfully discharged.
>
> You are further instructed that an employer is not free to discharge, discipline or otherwise adversely treat an employee who acts in accordance with the statutory right or duty, or where the employee fails or refuses to violate the law in the course of his employment; nor can the employer discharge the employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of Michigan or the United States.
>
> Now, you are further instructed that it is against public policy to restrain or coerce an employer in the selection of its representative for collective bargaining or adjustment of grievances or; secondly, to refuse to bargain with an employer based on the employers selection of its representative.

See Appendix B at p. 8a-9a.

While this third paragraph of the jury instructions is technically correct, it has no application to Garavaglia's action because (i) the defendants in this case were the employer and not the union and (ii) the Act has no language creating a private cause of action.

Despite these shortcomings, the jury returned a verdict in favor of Garavaglia on the breach of public policy claim and assessed $100,000 in non-economic damages based on the public policy discharge claim.

The Court of Appeals held that "the trial court's instructions adequately informed the jury of the law." See Appendix B at p. 9a. The Court of Appeals further held that "a claim regarding a breach of public policy may be premised on the alleged violation of a federal statute" and "the fact that the NLRA does not specifically confer rights upon plaintiff is not dispositive." See Appendix B at p. 9a.

Centra filed its application with the Michigan Supreme Court for leave to appeal issues related solely to the public policy conclusions reached by the Court of Appeals. The Michigan Supreme Court declined to address the issues.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals erred in upholding the validity of a cause of action against defendants for violation of public policy based on 29 U.S.C. §158(b)(1)(B). Garavaglia is not a party who is protected by the National Labor Relations Act and has no remedies under 29 U.S.C. §158(b)(1)(B). Furthermore, there is a need for this Court to give guidance to the lower courts regarding whether an expansive or restrictive definition of a public policy claim is appropriate.

I.
The Michigan Court Erred In Upholding The Validity Of A Public Policy Cause Of Action Based Upon The National Labor Relations Act

29 U.S.C. §158(b)(1)(B) provides as follows:

> It shall be an unfair labor practice for a *labor organization* or its agents . . . to restrain or coerce . . . an employer in the selection of his

> representatives for the purposes of collective bargaining or the adjustment of grievances . . . .

(Emphasis added.)

No cases could be found to support a state court creating a private cause of action for violation of public policy between an employer and a union. If Congress wanted to create a cause of action, it surely knows how to do so. The Act is clear and unambiguous and does not create a private cause of action. It is axiomatic in our republic that a member state cannot create or amend federal legislation.

Moreover, even if the NLRA could be expanded to create a private cause of action, Garavaglia is not in a protected class. Garavaglia was a vice president of labor relations for Centra. In that position, Garavaglia and other similarly situated employees did not have remedies conferred upon them by the National Labor Relations Act. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In the *Bell Aerospace* case, this Court summarized the legislative history of the Act as follows:

> The House wanted to include certain persons within the definition of "supervisors," such as straw bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate's view prevailed. There were other persons, however, who both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of certain of these persons explicit. In the conference agreement, representatives from both the House and the Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as

> outside the Act. Among those mentioned as impliedly excluded were persons working in "labor relations, personnel and employment departments," and "confidential employees." But assuredly this did not exhaust the universe of such excluded persons. The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event." H. R. Rep. No. 245, p. 23 (emphasis added).

Id. at 283. Similarly, in *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 610 (8th Cir. 1971) the Eighth Circuit Court of Appeals held that labor relations personnel are not protected by the Act ("it is not logical to assume that Congress intended to protect managerial employees who are so closely aligned with management as to be excluded from the bargaining unit").

The Michigan court's misguided reliance upon the NLRA to provide a valid basis for Garavaglia's public policy claim against Centra is a misconstruction of congressional intent which should be reviewed by this Court. The misapplication of this provision of the NLRA resulted in a invalid construction of the law as applied to Centra for the reason that Garavaglia has no remedy under the NLRA.

The clear language of 29 U.S.C. §158(b)(1)(B) proscribes coercion of an *employer* by a *union* and provides a remedy for any such violation to the *employer*. An employer may file an unfair labor practice charge against the union. No such factual scenario exists in this case. The decision of the Michigan court must be reviewed and reversed.

II.

The Michigan Court's Expansive Definition Of A Public Policy Claim Further Highlights The Need For This Court To Fashion An Appropriate Definition

It is clear that courts addressing the issue of an appropriate definition for a public policy claim are in conflict as to the appropriate elements for such claim.

For example, courts are clearly divided over whether non-legislative sources can provide the basis for a public policy claim in wrongful discharge cases. One of the leading cases for a broad interpretation is *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J.1980). The New Jersey Supreme Court explained:

> The sources of public policy [which may limit the employer's right of discharge] include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy.

Id. at 512.

Other states have also adopted similarly broad views of the public policy exception. *See Parnar v. Americana Hotels,*

Inc., 652 P.2d 625, 631 (Hawaii 1982) ("In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme."); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981)("In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions."); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871 (Mo.Ct.App. 1985)("'[p]ublic policy' is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good .... It finds its sources in the state constitution, ... in the letter and purpose of a constitutional, statutory or regulatory provision or scheme, ... in the judicial decisions of the state and national courts, ... in 'the constant practice of the government officials,' ... and, in certain instances, in professional codes of ethics.").

Similarly, other states have also applied a broad public policy definition in this context. *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 593 (Minn. Ct. App. 1986)("[a] public policy exception can be reasonably defined by reference to clear mandates of legislative or judicially recognized public policy"); *Cloutier v. Great Atlantic & Pac. Tea Co.*, 436 A.2d 1140, 1144 (N.H. 1981)("Public policy exceptions giving rise to wrongful discharge actions may also be based on non-statutory policies."); *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025, 1034 (Ariz. 1985)("reliance on prior judicial decisions, as part of the body of applicable common law, is appropriate ...").

However, better reasoned decisions apply a stricter definition to public policy claims. One of the leading cases

applying the stricter standard is *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (Wis. 1983). In *Brockmeyer*, the Wisconsin Supreme Court recognized a public policy exception to the employment at-will doctrine. However, the court limited plaintiffs to contract damages and confined such claims to statutory or constitutional violations. The court held as follows:

> Given the vagueness of the concept of public policy, it is necessary that we be more precise about the contours of the public policy exception. A wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. The public policy must be evidenced by a constitutional or statutory provision.

Id. at 840.

Similarly, the Kentucky Supreme Court adopted the *Brockmeyer* definition in *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730 (Ky. 1983). The Kentucky court held that:

> Employers as a group have a legitimate interest to protect by having the cause of action for wrongful discharge clearly defined and suitably controlled. . . . When a discharged employee seeks to establish a cause of action for wrongful discharge, it is a question of law for the court to decide whether the reason for discharge is unlawful because of a constitutionally protected right or a right implicit in a statute.

Id. at 733.

Other state and federal courts have also similarly restricted the public policy doctrine. *See Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985); *Adams v. George W. Cochran & Co., Inc.*, 597 A.2d 28, 33-34 (D.C. 1991); *Miller v. Fairfield Communities, Inc.*, 382 S.E.2d 16, 19 (S.C. 1989); *Merck v. Advanced Drainage Systems, Inc.*, 921 F.2d 549, 554-555 (4th Cir. 1990)(applying South Carolina law).

The Michigan court's expansive interpretation of a public policy claim further highlights the necessity for this Court to give guidance to the lower state and federal courts as to a workable definition to a public policy claim. The Michigan court's foundational basis of a federal statutory violation which itself provides no remedy to the claimant provides sufficient basis for this Court to grant certiorari and provide the necessary guidance.

CONCLUSION

There exists no valid claim for a public policy violation based on 29 U.S.C. §158(b)(1)(B) where it was alleged that an employer, Centra, violated public policy by violating that statute. Respondent in this case is not a party who is protected by the National Labor Relations Act. He has no remedies under 29 U.S.C. §158(b)(1)(B). Further, there exists a need for this Court to guide the lower courts which have addressed the issue of public policy claims as to whether an expansive or restrictive definition of a public policy claim violation is appropriate.

Petitioners respectfully request that this Court grant certiorari to consider the issues raised herein.

Respectfully submitted,

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APPENDIX A

Michigan Supreme Court Order

CENTRA, INC., CENTRAL TRANSPORT, INC., and CENTRAL CARTAGE CO., Plaintiffs-Appellants,

v

CHARLES GARAVAGLIA and C&G CONSULTANTS, INC., Defendants-Appellees.

SC: 104180

SUPREME COURT OF MICHIGAN

452 Mich. 867; 1996 Mich. LEXIS 1649

July 16, 1996, Decided

PRIOR HISTORY: [*1] LC: 93-465449-CK. COA: 185026.

OPINION:

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX B

Michigan Court of Appeals Decision

CHARLES GARAVAGLIA, Plaintiff-Appellee,

v

CENTRA, INC., CENTRAL TRANSPORT, CENTRAL CARTAGE COMPANY, and MANUEL J. MOROUN a/k/a MATTIE Y. MOROUN, Defendants-Appellants, and AGNES A. MOROUN, Defendant.

No. 148153

COURT OF APPEALS OF MICHIGAN

211 Mich. App. 625; 536 N.W.2d 805; 1995 Mich. App. LEXIS

287; 11 BNA IER CAS 308; 150 L.R.R.M. 2443

October 19, 1994, Submitted
June 23, 1995, Decided

DISPOSITION:

Affirmed.

COUNSEL: Gottlieb & Goren P.C. (by Charles Gottlieb), for the plaintiff. Southfield.

Plunkett & Cooney, P.C. (by Ernest R. Bazzana and Kelly A. Freeman), for the defendants. Detroit.

JUDGES: Before: Wahls, P.J., and Jansen and J.P. Noecker, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

OPINIONBY: Kathleen Jansen

OPINION:

JANSEN, J.

Defendants Centra, Inc., Central Transport, Central Cartage Company, and Manuel J. Moroun (hereafter defendants), appeal as of right from a jury verdict for plaintiff in the amount of $ 197,500 in this action alleging wrongful discharge. We affirm.

Plaintiff filed his complaint in the Wayne Circuit Court, alleging age discrimination, breach of an employment contract terminable for just cause only, discharge in breach of public policy, tortious interference with contractual relations, violation of the Employee Right to Know Act, MCL 423.501 et seq., MSA 17.62(1) et seq., and seeking a declaratory judgment (specific performance). A jury found for plaintiff with regard to the claim of breach of an employment contract terminable for just cause only (awarding $ 60,000), the claim of breach of public policy (awarding $ 100,000), and the declaratory judgment claim (awarding $ 37,500 for breach of a written retainer fee contract). Defendants now contest the verdict with regard to the claim of breach of public policy.

Plaintiff alleged that his employment was terminated in breach of public policy on the bases that defendants submitted to union demands that they fire plaintiff to achieve "labor peace," that plaintiff failed to obey defendants' request to destroy documents subpoenaed by a federal grand jury, and that plaintiff blocked an offer by the union to dismiss a lawsuit by refusing to agree not to countersue the union. Defendants

admitted in their trial brief that they terminated plaintiff's employment because of union pressure that there would be no labor peace unless plaintiff was removed. It was plaintiff's contention that it was a violation of the National Labor Relations Act (NLRA) for the union to influence defendants in their choice of a bargaining representative. 29 U.S.C.S. 158(b)(1)(B).

I

Defendants first contend that the jury verdict regarding the claim of breach of public policy must be vacated because plaintiff cannot recover damages for both breach of an employment contract terminable for just cause only and discharge in breach of public policy.

We find that this issue is not properly preserved for appellate review. Defendants never argued below that breach of an employment contract terminable for just cause only and breach of public policy are alternative theories and that plaintiff cannot recover under both. Issues raised for the first time on appeal ordinarily are not subject to review. Booth Newspapers, Inc v Univ of Michigan Bd of Regents, 444 Mich. 211, 234; 507 N.W.2d 422 (1993). Because this issue was never raised below, we decline to review it. See Peterman v Dep't of Natural Resources, 446 Mich. 177, 183; 521 N.W.2d 499 (1994) (it is a "time-honored rule that, absent unusual circumstances, issues not raised at trial may not be raised on appeal").

II

Defendants next contend that the trial court erred in denying their motion for a directed verdict with regard to the claim of breach of public policy.

Plaintiff's claim regarding breach of public policy was based on the NLRA. Specifically, plaintiff alleged that defendants breached public policy by yielding to union demands to fire plaintiff. Pursuant to 29 U.S.C.S. 158(b)(1)(B), it is an unfair labor practice for a union to coerce an employer regarding the selection of the employer's labor relations representative. Defendants contend that plaintiff's claim is legally insufficient because Michigan does not recognize an implied cause of action for breach of public policy when an employer violates federal law. Defendants also contend that the NLRA does not confer rights on plaintiff and, because he is not protected by the NLRA, he cannot receive a remedy for the alleged violation.

We first note that the question regarding legal sufficiency raised by defendants was not raised in the trial court in their motion for a directed verdict. Rather, defendants raised this issue by objecting to the trial court's instructions regarding the alleged breach of public policy. Thus, with regard to the issue concerning legal sufficiency, we review the trial court's instructions as a whole. The question is whether the instructions as given adequately informed the jury of the applicable law reflecting the various evidentiary claims in the particular case. Riddle v McLouth Steel Products Corp, 440 Mich. 85, 101; 485 N.W.2d 676 (1992). We find that the jury instructions adequately informed the jury of the applicable law.

In Suchodolski v Michigan Consolidated Gas Co, 412 Mich. 692, 695; 316 N.W.2d 710 (1982), the Supreme Court stated that an exception to the employment at will doctrine will be recognized on the basis of the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. First, an exception exists where there are explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in

accordance with a statutory right or duty. Id. Second, such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment. Id. Finally, a cause of action has also been found to be implied where the alleged reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment. Id., p 696. To some extent, the first of the three grounds in Suchodolski has been limited in Dudewicz v Norris Schmid, Inc, 443 Mich. 68, 80; 503 N.W.2d 645 (1993), where the Court held that a public policy claim is sustainable only where there is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue.

The trial court instructed the jury in pertinent part as follows:

Now, you are instructed that if you find the plaintiff was dismissed from his employment or from performing the obligations, the duties and demands of his office or release from his employment service, or moved from a greater job to a lesser job that you may find that plaintiff was wrongfully discharged.

You are further instructed that an employer is not free to discharge, discipline or otherwise adversely treat an employee who acts in accordance with the statutory right or duty, or where the employee fails or refuses to violate the law in the course of his employment; nor can the employer discharge the employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of Michigan or the United States.

Now, you are further instructed that it is against public policy to restrain or coerce an employer in the selection of its representative for collective bargaining or adjustment of

grievances or; secondly, to refuse to bargain with an employer based on the employers selection of its representative.

We find that the trial court's instructions adequately informed the jury of the law. We agree with plaintiff that a claim regarding a breach of public policy may be premised on the alleged violation of a federal statute. Other jurisdictions have also recognized a wrongful discharge action based on a clearly articulated federal policy. Sherman v St Barnabas Hosp, 535 F. Supp. 564 (SD NY, 1982); D'Agostino v Johnson & Johnson, Inc, 133 N.J. 516; 628 A.2d 305 (1993). Further, the fact that the NLRA does not specifically confer rights upon plaintiff is not dispositive. As this Court has stated, "the better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state." Sventko v Kroger Co, 69 Mich. App. 644, 647; 245 N.W.2d 151 (1976). Thus, it is the fact that the employer discharged plaintiff in contravention of the public policy of this state that permits plaintiff's claim regarding the breach of public policy.

In any event, plaintiff was entitled to be the employer's bargaining representative without influences from the union. Under the NLRA, a duty is imposed on the union not to influence or interfere with an employer's choice of a bargaining representative. Accordingly, the NLRA did confer a right upon plaintiff to be the bargaining representative without being pressured to leave by the union. Under these circumstances, the third prong of Suchodolski is satisfied because a cause of action may be had where the alleged reason for the discharge is the employee's exercise of a right conferred by a well-established legislative enactment.

Next, defendants contend that plaintiff failed to prove a prima facie case of breach of public policy and that the trial

court, therefore, erred in denying their motion for a directed verdict. When evaluating a motion for a directed verdict, the court must consider the evidence in a light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. Locke v Pachtman, 446 Mich. 216, 223; 521 N.W.2d 786 (1994). Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. Brisboy v Fibreboard Corp, 429 Mich. 540, 549; 418 N.W.2d 650 (1988).

We find that plaintiff presented sufficient evidence at trial of a claim for breach of public policy. Plaintiff alleged that defendants terminated his employment by yielding to union demands that terminating his employment was the only way of achieving labor peace. Plaintiff testified that he was told that he would be removed from labor relations because he had been rendered neutral with the union during the many "snowballs" with other transportation companies. According to plaintiff, defendants were taking over the bankruptcies of other transportation companies, closing out the operations and creating confrontations with the unions in the bankruptcy courts. Plaintiff met with Manuel Moroun and it was reiterated that defendants' actions put plaintiff in the position that he had problems with the unions. Moroun made clear to plaintiff that plaintiff's work was satisfactory and that he knew that plaintiff was loyal. Further, defendants admitted in their opening statement that the union made clear to Moroun that it did not want to deal with plaintiff.

Taking this evidence in a light most favorable to plaintiff and drawing all legitimate inferences therefrom, we find that plaintiff presented sufficient evidence regarding his claim of breach of public policy to withstand a motion for a directed verdict. A rational trier of fact legitimately could infer that the

union pressured defendants into firing plaintiff in order to achieve labor peace.

III

Last, defendants argue that the trial court's order taxing costs should be reversed if this Court vacates the jury verdict or grants a new trial. Because we are affirming the jury's verdict, we also affirm the trial court's order taxing costs pursuant to MCR 2.625(A) and (B).

Affirmed.

/s/ Kathleen Jansen

/s/ Myron H. Wahls

/s/ James P. Noecker

Supreme Court
FILED
NOV 18 1996
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No. 96-619

In The

Supreme Court of the United States

October Term, 1996

CENTRA, INC., a Michigan corporation, CENTRAL TRANSPORT, INC., a Michigan corporation, CENTRAL CARTAGE COMPANY, a Michigan corporation, MANUEL J. MOROUN, a/k/a MATTIE MOROUN, and AGNES A. MOROUN, jointly and severally,

Petitioners,

v.

CHARLES GARAVAGLIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

Respondent restates the question presented as follows:

Was it error for Michigan's intermediate appellate court to refer to a federal statute, 29 U.S.C. § 158(b)(1)(B), in deciding whether there was a violation of Michigan public policy for an employer to fire its collective bargaining representative because a union demanded that it do so to have labor peace?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion by the Michigan Court of Appeals. The opinion is reported at 211 Mich App 625; 536 NW2d 805 (1995).

STATEMENT OF JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) because:

- No claim of right is made under a federal statute. Respondent's claim was decided based on the public policy of the State of Michigan.
- No federal question was raised or decided by the Michigan court. The ruling below decided, under state law, the adequacy of the jury instruction and the sufficiency of the trial evidence.
- Petitioners' claim of error was not preserved for appeal.

STATEMENT OF THE CASE

This case involves the reference by a state court to federal legislation to determine whether the firing of respondent violated state public policy.

A. Relevant Facts and Proceedings.

Respondent was petitioners' collective bargaining representative in charge of labor negotiations with the

Teamster Union. His complaint alleged, in part, that he was fired in breach of public policy because petitioners "submitted to union demands that they fire plaintiff to achieve 'labor peace'. . . . " Op., Petitioners' Appendix B at 5a. Respondent's complaint did not mention a right granted by a federal statute. He invoked Michigan public policy. The complaint alleged:

> 30. That the termination of the employment of the Plaintiff CHARLES GARAVAGLIA, under these circumstances was a breach of the public policy of the State of Michigan, and this breach of the public policy of the State of Michigan constituted a wrongful discharge, causing the following damages and injuries to the Plaintiff,. . . .

First Amended Complaint, 1/19/88.

The trial court instructed the jury that:

> [I]t is against public policy to restrain or coerce an employer in the selection of its representative for collective bargaining or . . . to refuse to bargain with an employer based on the employers selection of its representative.

Op., Appendix B at 8a-9a. The Michigan Court of Appeals "[found] that the trial court's instruction adequately informed the jury of the law." *Id.* at 9a. According to the court, a claim alleging breach of public policy "may be premised on the alleged violation of a federal statute." *Id.* The point, however, was the determination of Michigan's public policy:

> As this Court has stated, "the better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to

> contravene the public policy *of this state.*" Thus, it is the fact that the employer discharged plaintiff in contravention of the public policy *of this state* that permits plaintiff's claim regarding the breach of public policy.

Id. (emph. added; citation deleted).

In dicta, the Michigan Court of Appeals referred to plaintiff's rights under a federal statute:

> *In any event,* plaintiff was entitled to be the employer's bargaining representative without influences from the union. Under the NLRA [29 U.S.C. § 158(b)(1)(B)], a duty is imposed on the union not to influence or interfere with an employer's choice of a bargaining representative. Accordingly, the NLRA did confer a right upon plaintiff to be the bargaining representative without being pressured to leave by the union.

Id. (emph. added).

B. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15.2, respondent addresses misstatements made in the petition.

Petitioners misrepresent that they preserved an objection to the legal sufficiency of respondent's public policy claim. Petition at 3. However, the Michigan Court of Appeals pointed out:

> We first note that the question regarding legal sufficiency raised by defendants *was not raised* in the trial court in their motion for a directed verdict.

Op., Petitioners' Appendix B at 7a (emph. added). Thus, under Michigan law, the issue was not legal sufficiency, but:

> [W]hether the instructions as given adequately informed the jury of the applicable law reflecting the various evidentiary claims in the particular case.

Id. Accordingly, whether 29 U.S.C. § 158(b)(1)(B) by its express language conferred rights or applied to respondent was not the legal issue. As the Michigan Court of appeals stated, for an employee's public policy claim under Michigan law "the fact that the NLRA does not specifically confer rights upon plaintiff is not dispositive." Petitioners' Appendix B at 9a.

Furthermore, petitioners did not object to the trial court's public policy instruction. They agreed it was correct and so informed the Michigan Supreme Court:

> [T]he Court should note that defendants are *not* asserting that the trial court erred when it instructed that:
>
> "Now, you are further instructed that it is against the public policy to restrain or coerce an employer in the selection of its representative for collective bargaining or adjustment of grievances or; secondly, to refuse to bargain with an employer based on the employers' selection of its representative."
>
> *The instruction is correct.*

App. For Leave To Appeal To Mich. S.Ct. 9/12/95, p. 20 (emph. added). Petitioners reluctantly acknowledge that

the instruction was correct, albeit "technically" so. Petition at 4.

REASONS FOR DENYING THE WRIT

I. No Jurisdiction.

For Supreme Court jurisdiction, 28 U.S.C. § 1257(a) requires a claim of right under a federal statute. Wisely, this Court may not review judgments from state courts that are grounded in state law. *Herb v Pitcairn*, 324 U.S. 117, 125-26 (1944) ("Our only power over state judgments is to correct to the extent that they incorrectly adjudge federal rights."); *Cousins v Wigoda*, 419 U.S. 477, 487 (1975) (adequate state law ground forecloses Supreme Court jurisdiction). As already shown, the Michigan appellate court decided a state law question of Michigan public policy.

Also, the Michigan Court of Appeals decided that the public policy jury instruction adequately informed the jury of the applicable law. Op., Petitioners' Appendix B at 7a. Petitioners admitted to the Michigan Supreme Court that the jury instruction was correct. Petitioners' objection in the trial court was made by a motion for directed verdict. Under Michigan law, the appellate court then reviews the trial court evidence to decide whether "no factual question exists upon which reasonable minds may differ." *Id.* at 10a. This Court does not grant review upon issues about the sufficiency of evidence. See *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 U.S. 209, 230 (1993); *NLRB v Hendricks County Rural Elec. Membership*

Corp, 454 U.S. 170, 177 (1981) (a question of fact does not merit Court review).

It is fundamental that under 28 U.S.C. § 1257(a) this Court will not review state court decisions on an issue not raised in the lower courts. *Yee v City of Escondido,* 503 U.S. 519, 533 (1992); *Beck v Washington,* 369 U.S. 541, 553 (1962). Nor does this Court have jurisdiction if the federal claim was not adequately presented in the state court. *Webb v Webb,* 451 U.S. 493, 496-97 (1981). Also see *Sochor v Florida,* 504 U.S. 527, 533 (1992) (no jurisdiction if objection not preserved for appeal). As already noted, petitioners did not preserve an objection to the legal sufficiency of respondent's claim, i.e., whether the federal statute applied to or conferred rights upon plaintiff. Op., Petitioners' Appendix B at 7a.

II. Moreover, There Is No Important Federal Question.

Supreme Court Rule 10 advises that "a writ of certiorari will be granted only for compelling reasons." In particular, for appeals from a state court, this Court will consider whether the state court decided an important federal question that conflicts with other appellate decisions or is one that should be settled by the Supreme Court. Supreme Court Rule 10(b) and (c). See *Rice v Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955) (Court does not decide cases to satisfy a scholarly interest or for the benefit of particular litigants; the problem should be beyond the academic or episodic).

Petitioners cite no case that conflicts with the Michigan Court of Appeals decision. To the contrary, the few reported decisions are in accord that there is a public

policy protecting an employer's bargaining representative from union threats against his job security. See *Sherman v St. Barnabas Hospital,* 535 F.Supp. 464, 572 (S.D.N.Y. 1982) (to permit employer to discharge an employee because of union threats would foster future union coercion and is contrary to public policy); *Intern. Org. Of Masters v NLRB,* 539 F.2d 554, 560 (5th Cir. 1976) (relations between an employer and its supervisory personnel should be isolated from union coercion). Furthermore, while the parties here regard this case and the public policy involved as important to them, the relative absence of decisional law or of any conflict with other decisions suggests a lack of federal importance.

Petitioners also argue that Michigan has not sufficiently restricted public policy claims. According to petitioners, there is a conflict among state courts whether they may derive public policy from non-legislative sources and that Michigan has adopted an expansive interpretation.[1] Petition, pp. 8-11. Whatever may be the merits of that legal discussion, no federal question, much less an important one, is involved. Instead, this is a question of Michigan public policy applicable to a termination of an employee.

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[1] However, as appears from the Court of Appeals opinion, the court did refer to a legislative source, 24 U.S.C. § 158(b)(1)(B). Thus, petitioners' concern may be of legal interest, but is irrelevant.

CONCLUSION

Petitioners misapprehend the Michigan Court of Appeals' decision. That court did not interpret or declare respondent's rights granted by a federal statute. Instead, the Michigan court decided Michigan public policy and that the petitioners "discharged plaintiff in contravention of the public policy of this state." Op., Petitioners' Appendix B at 9a. There is no apparent error in finding a public policy protecting the job security of an employer's collective bargaining representative from union pressure. Moreover, this Court does not have jurisdiction over a claim brought under state law that an employee was fired in breach of the state's public policy, nor does that theory present an important federal question.

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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